Filed 3/4/19 P. v. Scholten CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY PELLOUCHOUD SCHOLTEN,

Defendant and Appellant.

2d Crim. No. B284334
(Super. Ct. No. 16F-01604)
(San Luis Obispo County)

Henry Pellouchoud Scholten appeals a judgment following conviction of assault with a deadly weapon, battery with serious bodily injury, assault by means likely to produce great bodily injury, and resisting an executive officer by force, with findings of personal infliction of great bodily injury, personal weapon use, a prior serious felony strike conviction, and service of two prior prison terms. (Pen. Code, (§§ 245, subd. (a)(1), 243, subd. (d), 245, subd. (a)(4), 69, 12022.7, subd. (a), 12022, subd. (b)(1), 667,

subds. (d) & (e), 1170.12, subds. (b) & (c), 667.5, subd. (b).)[1] We direct the trial court to strike the prior prison term enhancement based upon the 2013 attempting taking of a vehicle conviction, but otherwise affirm.

*FACTUAL AND PROCEDURAL HISTORY*

This appeal concerns assaultive crimes committed by Scholten, a patient at Atascadero State Hospital, against four hospital employees and a hospital police officer. On appeal, Scholten contests the sufficiency of evidence to support his conviction of resisting an executive officer by force. He also claims that the trial court abused its discretion by not striking his prior serious felony strike conviction for arson and by staying sentence upon, rather than striking, his prior prison term findings.

On February 24, 2016, Scholten was a patient at Atascadero State Hospital. That evening, Floyd Everhart, a psychiatric technician and hospital employee, monitored Scholten as Scholten consumed his psychotropic medication. Scholten was agitated and upset and attempted to leave Everhart's view, stating that he was "done." Everhart prevented Scholten from leaving, however, to ensure that he did not spit out the medication. Scholten previously had resisted taking his medication and therefore was now observed by employees during medication dispensing.

Approximately an hour later, Everhart sat in a chair and observed another patient who was at risk for self-harm. Everhart drank from an insulated metal cup as he faced that patient's room. Suddenly, Scholten assaulted Everhart, shouting that

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[1] All statutory references are to the Penal Code unless otherwise stated.

Everhart was "raping the earth." Registered Nurse Teresa Wenzel saw Scholten "beating [Everhart] with a metal mug and kicking him while he was on the ground." Wenzel and hospital employees Gilbert Luna and Robert Rowen sounded the emergency alarm and rushed to rescue Everhart.

Scholten shouted at the employees, threw the metal cup at Wenzel, and then punched her in the head. The metal cup grazed Wenzel's arm and struck her head. Luna and Rowen attempted to restrain Scholten, but he resisted and struck Rowen in the face. Scholten struck Luna seven to eight times in his face and head and the two fell onto the floor during the struggle. After approximately 10 minutes, Luna and Rowen restrained Scholten. Luna suffered injuries to his knee, shoulder, head, and neck from the incident.

Uniformed Police Officer Tim Bradford responded to the emergency alarm. Luna and Rowen had pinned Scholten to the floor, but he continued to resist their restraint. Bradford made eye contact with Scholten and then turned him to a prone position to handcuff him. Scholten surrendered his right hand for the handcuffing, but resisted giving Bradford his left hand despite repeated commands. Bradford testified that Scholten "was actively resisting the commands, he was trying to keep his hand tucked underneath him and was pulling it away from [Rowen] who was trying to pull his arm out." Following his eventual handcuffing, Scholten stated to Bradford, "[Everhart] deserved it."

Everhart lay unconscious in a pool of blood and was vomiting. He spent five days in the hospital with traumatic brain injury, black eyes, bruises, and multiple cuts on his head and face. At trial, Everhart had no memory of the assault. As a

consequence of the assault, Everhart has limited range of motion in his neck and a fractured elbow.

The jury convicted Scholten of assault with a deadly weapon (count 1), battery with serious bodily injury (count 2), assault by means likely to produce great bodily injury (counts 4, 5, & 6), and resisting an executive officer by force (count 7). (§§ 245, subd. (a)(1), 243, subd. (d), 245, subd. (a)(4), 69.) The jury also found that Scholten inflicted great bodily injury regarding count 1, and personally used a deadly weapon regarding count 2. (§§ 12022.7, subd. (a), 12022, subd. (b)(1).) In a separate proceeding, the trial court found that Scholten suffered a prior strike conviction and served two prior prison terms. (§§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c), 667.5, subd. (b).)

The trial court sentenced Scholten to a prison term of 16 years four months, consisting of a three-year midterm for count 1, plus consecutive one-year terms for counts 4, 5, and 6, and a consecutive eight-month term for count 7. The court then doubled these terms based upon Scholten's prior strike conviction. It also added a consecutive three-year term for the great bodily injury enhancement and stayed imposition of sentence for the prior prison terms. The court also imposed a $500 restitution fine, a $500 parole revocation restitution fine (suspended), a $240 court security assessment, and a $180 criminal conviction assessment, ordered victim restitution, and awarded Scholten 556 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Scholten appeals and contends that 1) insufficient evidence supports his conviction of resisting an executive officer by force or

violence; 2) the trial court abused its discretion by denying his motion to strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; and 3) the court's agreement to stay a prior prison term enhancement should be construed as a striking of the prior.

In supplemental briefing, Scholten asserts that we must reverse his conviction and remand the matter for consideration of the mental health diversion program of newly enacted section 1001.36. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted Dec. 27, 2018, S252220.)

*DISCUSSION*

*I.*

Scholten argues that there is insufficient evidence that he used force against Bradford constituting a violation of section 69. He asserts that the evidence supports only the lesser crime of resisting an executive order, relying upon *In re J.C.* (2014) 228 Cal.App.4th 1394, 1399-1400 [sufficient evidence supports conviction of section 148, subdivision (a)(1), misdemeanor resisting a police officer, where minor evaded officer's grasp].

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Gomez* (2018) 6 Cal.5th 243, 278; *People v. Brooks* (2017) 3 Cal.5th 1, 57; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*Johnson*, at p. 988.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47,

60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony [are] the exclusive province of the trier of fact"].) We must accept logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Albillar*, at p. 60.) Moreover, the testimony of a single witness is sufficient to prove a fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

The sufficiency of evidence in a particular case depends upon the factual circumstances in that case. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) A finding of sufficiency in one case does not suggest that weaker factual circumstances in another case will not support a conviction. (*Ibid.*) In our review, we focus upon the evidence that was presented, rather than evidence that might have been but was not presented. (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

Section 69 punishes "[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty." The force used includes "*resisting* an officer's attempt to restrain and arrest the defendant." (*People v. Bernal* (2013) 222 Cal.App.4th 512, 519 [section 69 not limited to force or violence directed toward the person of the executive officer].) Section 69 "plainly covers" the situation "where an officer's attempt to lawfully restrain

defendant was hampered by defendant's quite forceful attempt to escape that restraint." (*Bernal*, at p. 514.)

Sufficient evidence and all reasonable inferences therefrom support the conviction of resisting an executive officer by force. Scholten forcefully attempted to escape Bradford's lawful restraint by tucking his left arm and hand under his body and resisting Rowen's attempts to pry it free. (*People v. Bernal*, *supra*, 222 Cal.App.4th 512, 520 [defendant's forceful resistance included swinging his hips to free himself of officer's grasp]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 985-986 [defendant's forceful resistance included squirming and refusing to give right hand to officer].) Bradford testified that Scholten "actively struggl[ed]" to prevent the handcuffing of his left hand, "pulling [his hand] away from [Rowen] who was trying to pull his arm out." This active struggle necessitated Rowen's assistance to pull Scholten's left arm and hand out from under his body. These circumstances satisfy section 69 and constitute sufficient evidence of knowingly resisting by the use of force an executive officer in the performance of his duties.

*In re J.C.*, *supra*, 228 Cal.App.4th 1394, does not assist Scholten. There, the prosecutor charged the minor with a violation of section 148, subdivision (a)(1), not section 69. The reviewing court found sufficient evidence supported the judgment based upon the minor's refusal to follow the officer's orders and the minor's evasion of the officer's grasp. (*J.C.*, at p. 1400.) The charges there rested upon the circumstances in that case and did not include a violation of section 69.

*II.*

Scholten contends that the trial court abused its discretion and denied him due process of law by denying a motion to dismiss

his 2009 arson strike conviction in the interest of justice. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.) In a thoughtful and lengthy written motion, defense counsel pointed out that Scholten has long suffered from mental illness (schizoaffetive disorder) that has evolved from youthful eccentric misbehavior to antisocial behavior. The motion also set forth a thorough discussion of the law regarding the dismissal of prior felony strike convictions.

Pursuant to section 1385, subdivision (a), the trial court may strike a prior felony conviction "in furtherance of justice." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The trial court and the reviewing court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part . . . ." (*Ibid.*) At the very least, the reason for dismissing a strike conviction must be that which would motivate a reasonable judge. (*Id.* at p. 159; see also *People v. Johnson* (2015) 61 Cal.4th 674, 688-689.) When the circumstances "manifestly support" the striking of a prior conviction and no reasonable minds could differ, the failure to strike constitutes an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 378, 376-378; *id.* at p. 378 [abuse of discretion exists only in "an extraordinary case"].)

We review rulings regarding motions to strike prior felony convictions pursuant to a deferential abuse of discretion standard. (*People v. Williams*, *supra*, 17 Cal.4th 148, 162; *People v. Myers* (1999) 69 Cal.App.4th 305, 309.) Appellant bears the burden of establishing that the trial court's decision is

unreasonable. (*People v. Carmony*, *supra*, 33 Cal.4th 367, 376 [burden placed on appellant to establish that sentencing decision is irrational or arbitrary]; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives]; *Myers*, at pp. 309-310.) We do not substitute our decision for that of the trial court. "It is not enough to show that reasonable people might disagree about whether to strike one or more of [defendant's] prior convictions." (*Myers*, at p. 310.)

In ruling, the trial court stated that it had read Scholten's motion twice and had considered his mental health issues ("It's very clear that Mr. Scholten has some mental health needs that need to be met"). The court concluded, however, that Scholten's strike conviction "fit within the statutory scheme" in part because his prior arson conviction was a serious offense. The court then denied Scholten's motion.

The trial court properly determined that this is not an extraordinary case that "manifestly support[s]" dismissal of the prior strike. (*People v. Carmony*, *supra*, 33 Cal.4th 367, 378.) As such, the court did not abuse its discretion. (*People v. Solis* (2015) 232 Cal.App.4th 1108, 1124 [no abuse of discretion in refusal to strike two 30-year-old felony convictions for assault with a deadly weapon].) Scholten has a lengthy criminal history, including the 2009 arson conviction. At the time of the present offenses, Scholten had pending criminal charges for trespassing and vandalism. The court considered his longtime mental illness and recent decompensation, and concluded that he was not outside the spirit of the three strikes law. Scholten has not met his burden of establishing that the court's decision was

unreasonable or that the court misunderstood its sentencing discretion. (*Carmony*, at p. 376.)

*III.*

Scholten argues that the trial court erred by staying his two prior prison term sentence enhancements rather than striking them.

The prosecutor charged Scholten with having served two prior prison terms within the meaning of section 667.5, subdivision (b), based upon a 2009 arson conviction and a 2013 attempted taking of a vehicle conviction. The prosecutor also alleged that the arson conviction was a strike within the three strikes law. The trial court found that the prior prison term and strike allegations were true. At sentencing, the court stayed sentence of the two prior prison term allegations at the request of the prosecutor. The prosecutor then, however, moved to dismiss the arson prison term allegation. After further discussion, the court again stayed sentence regarding the prison priors and the prosecutor agreed ("Stay the prison priors . . . 667.5"). There was no further discussion regarding the prison priors. The later abstract of judgment indicates only one prison prior and that prior was stayed.

We agree with the reasoning of *People v. Brewer* (2014) 225 Cal.App.4th 98, 103-105 [prior prison term enhancement should be stayed not struck when the underlying conviction also serves as the basis for a serious felony enhancement]; *People v. Walker* (2006) 139 Cal.App.4th 782, 794, footnote 9 [same]; and *People v. Lopez* (2004) 119 Cal.App.4th 355, 363-366 [unused sentencing alternative must be stayed not struck], that the prior prison term sentence enhancement based upon the arson conviction should be stayed rather than struck. These decisions rely upon California

Rules of Court, former rule 4.447, which requires the sentencing court to "impose sentence for the aggregate term of imprisonment computed without reference to prohibitions and limitations, and [to] thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit." (See Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2018) § 12.5, pp. 12-17 to 12-19.) In *People v. Jones* (1993) 5 Cal.4th 1142, 1153, our Supreme Court did not discuss whether striking an unused enhancement is the appropriate remedy. (*Lopez*, at p. 364.) Accordingly, the trial court here properly imposed but stayed sentence for the prison prior based upon the arson conviction because that conviction was also the basis for the felony strike. However, the court erred by staying sentence for the prison prior based upon the 2013 attempted vehicle taking conviction. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [“Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken”].)

*IV.*

Scholten requests a remand to allow the trial court to make an eligibility determination regarding mental health pretrial diversion according to newly enacted sections 1001.35 and 1001.36. He points out that he presented evidence that he has a longtime diagnosis of schizoaffective disorder. Scholten argues that the statute applies retroactively, relying upon *People v. Frahs, supra,* 27 Cal.App.5th 784, 791.

Effective June 27, 2018, the Legislature created a mental health diversion program for defendants with diagnosed and qualifying mental disorders, including bipolar disorder, schizophrenia, or posttraumatic stress disorder. (§ 1001.36,

subds. (a) & (b).) A stated purpose of the legislation is to promote "[i]ncreased diversion of individuals with mental disorders . . . while protecting public safety." (§ 1001.35, subd. (a).) Section 1001.36, subdivisions (a) and (b)(1) provide that the court may grant pretrial diversion if a defendant meets six requirements. The requirements are: 1) the court is satisfied that the defendant suffers from a qualifying mental disorder, as defined by the statute; 2) the court is satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense; 3) a qualified mental health expert opines that the defendant's symptoms motivating the criminal behavior would respond to mental health treatment; 4) the defendant consents to diversion and waives his or her right to a speedy trial; 5) the defendant agrees to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. The Legislature enacted the diversion statutes to ameliorate possible punishment for a class of individuals with qualifying mental health disorders by increasing diversion "to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

If the trial court grants pretrial diversion, the defendant "may be referred to a program of mental health treatment, utilizing existing inpatient or outpatient mental health resources" (§ 1001.36, subd. (c)(1)(B)) for "no longer than two years" (*id.*, subd. (c)(3)). If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of

the criminal proceedings at the time of the initial diversion." (*Id.*, subd. (e).)

*People v. Frahs, supra,* 27 Cal.App.5th 784, 791, held that the mental health diversion law applies retroactively to those defendants whose appeals are pending at the time of the statute's enactment. "[T]he Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion . . . 'apply to every case to which it constitutionally could apply.'" (*Ibid.*) *Frahs* relied upon our Supreme Court's holding in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, concluding that a juvenile transfer hearing must be made available to all defendants whose convictions are not yet final on appeal. (*Frahs,* at p. 791.)

Section 1001.36 was part of an omnibus bill addressing many diverse health-care related concerns. One concern pertained to criminal defendants whose mental disorders precluded their competence to stand trial. (See Stats. 2018, ch. 34, §§ 25-27 [amending §§ 1370, 1370.01, 1372].) The bill enacted a provision authorizing a court, after finding a defendant mentally incompetent to stand trial and before transporting the defendant for treatment to restore competency, to grant the defendant diversion pursuant to section 1001.36 if the defendant is otherwise eligible for diversion. (§ 1370, subd. (a)(1)(B)(iv)-(v).)

Section 1370, subdivision (a)(1)(B)(iv) provides that "[i]f, at any time after the court finds that the defendant is mentally incompetent and before the defendant is transported to a facility pursuant to this section, . . . the court may make a finding that the defendant is an appropriate candidate for diversion." It could be argued that Scholten is not eligible for diversion because he

had been transported to a state hospital and was in that facility when the present offense was committed.

In any event, Scholten had been adjudicated as incompetent to stand trial for earlier unrelated charges at the time he committed his present crimes and placed in a state hospital (Atascadero State Hospital) as defined by section 1370, subdivision (a)(1)(B)(i). Accordingly, he is ineligible for diversion. The legislation here expresses the legislative intent with sufficient clarity that we can discern and must effectuate. (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1049.) As such, the pretrial mental health diversion procedure does not apply to Scholten pursuant to the exclusion of section 1370, subdivision (a)(1)(B)(iv).

The trial court is directed to strike the 2013 prior prison term enhancement and correct the court minutes accordingly. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

YEGAN, J., Concurring:

I have signed and I concur with the majority opinion. There is no need to reach the constitutionality of the newly enacted mental health diversion statute. (See *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1102.) My concurrence should not be considered an opinion that the subject statute is constitutional.

NOT TO BE PUBLISHED.

YEGAN, J.

Gail L. Peron, Judge
Superior Court County of San Luis Obispo

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